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IN THE

Supreme Court of the United States

October Term, 1993

MARY HORNING,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

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TO: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Honorable Court to review this case.

The questions presented herein were raised in the Eighth District Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of all counts of the indictment. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed *sua sponte* the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of the Ohio and the United States Supreme Court. There is, therefore, no substantial federal question presented by the Petition for Certiorari.

STATEMENT OF THE CASE

Mary Horning, the petitioner herein, was indicted by the Grand Jury of Cuyahoga County, Ohio, on June 1, 1990, for Aggravated Arson in violation of R.C. 2909.02. The indictment contained a prior aggravated felony specification. In response to the charge, petitioner entered pleas of not guilty and not guilty by reason of insanity.

Because of the insanity plea, the trial court referred petitioner to the Court Psychiatric Clinic for evaluation of her competency to stand trial and her sanity at the time of the act. The court-appointed psychologist completed her evaluation on August 21, 1990, determining petitioner to be both competent to stand trial and sane at the time of the act.

After an exchange of discovery information, the defense filed a motion to suppress petitioner's oral and written confessions, arguing alleged mental illness as a basis. After a hearing, the trial court denied petitioner's motion on March 11, 1991. On March 24, 1991, a jury trial commenced. On March 29, 1991, the jury returned a guilty verdict to Aggravated Arson with a prior aggravated felony specification. On April 2, 1991, the trial court denied petitioner's motion for a new trial and sentenced her to a term of actual incarceration of a minimum of ten years to a maximum of 25 years.

The petitioner appealed her conviction to the Court of Appeals of Ohio, Eighth District. On January 28, 1993, the appeals court announced its journal entry and opinion wherein it affirmed the conviction. Petitioner's motion for leave to appeal to the Supreme Court of Ohio was overruled on September 22, 1993.

STATEMENT OF THE FACTS

On May 15, 1990, a fire was reported of a wooden residential dwelling at 19435 Riverview Avenue, in Rocky River, Ohio. The fire was started in the second floor hallway. The second floor of the double home was the rented residence of Becky Starkey and her two young children. Mrs. Starkey testified that she knew petitioner as her downstairs neighbor with whom she was having trouble. Petitioner has threatened to kill Mrs. Starkey's children and had accused Mrs. Starkey of soliciting her husband. Becky Starkey recalls leaving for work at approximately 11:00 A.M. the morning of May 15, 1990. When she left, petitioner was the only one at the home. Mrs. Starkey returned home at approximately 12:00 to 12:30 P.M. at the request of the Rocky River Fire Department.

Charles Clark, the owner of the property, testified that on the date of the fire, Jim Horning and his wife, petitioner, lived in the downstairs at 19437 Riverview Drive in Rocky River, Ohio. Mr. Clark confirmed that Becky Starkey and her family resided in the upper floors of the same dwelling on the day of the fire.

Mr. Clark testified that he was called to the residence on May 15, 1990, by the Rocky River Fire/Police Department. Upon arriving, Mr. Clark proceeded upstairs to a common hallway that both tenants mutually used. Mr. Clark found an area burned and damaged. The damages were eventually paid for by petitioner's husband.

Captain Carl Kalkbrenner of the Rocky River Fire Department testified that he investigated the fire scene and determined that the fire had been deliberately started and caused physical damage to the door of Becky

Starkey's residence. Captain Kalkbrenner indicated that the origin of the fire was a decorative wreath attached to Becky Starkey's door. The wreath burned and fell to the floor. According to Captain Kalkbrenner, the fire was incendiary in nature and was started at approximately 12:15 P.M. on May 15, 1990. Other firemen on the scene recognized the downstairs tenant, petitioner Mary Horning, from a recent emergency call. Apparently, she had her stomach pumped due to an overdose of medications.

Lieutenant Bruce Gunsch of the Rocky River Police Department testified that as part of his investigation of the incident, he called petitioner and invited her to come to the station for questioning regarding the fire. Prior to the interview, petitioner was informed that if she chose to come to the station, she could bring with her whomever she liked—her lawyer, her husband, whomever. Petitioner appeared for the interview alone. Prior to the interview, petitioner was read her constitutional rights by Lieutenant Gunsch. The rights were read to petitioner from a pre-printed form. In addition, petitioner signed a pre-printed form indicating that she understood her rights. Prior to signing the form, petitioner confirmed that she understood what she was doing and that no promises or threats had been made to her or any kind of pressure used against her.

The interview was recorded with petitioner's approval. Lieutenant Gunsch indicated that before, during, and after the interview, petitioner did not appear to be under the influence of alcohol or drugs, her speech was coherent, and she did not exhibit any unusual behavior. During the interview, petitioner repeatedly admitted setting the fire to the residence on May 15, 1990, because she did not want the house to be there

when she got home. Additionally, petitioner read and signed a three-page written confession. The confession indicated she set the fire because she hated the house, among other things. Above her signature on the written confession appears the phrase, "I have made this statement voluntarily."

On behalf of petitioner, her husband, James Horning, testified to his wife's past mental illness. Mr. Horning, on cross-examination, admitted petitioner had substantial medical expenses balanced against his limited income, leading to serious financial problems. He also indicated that he and petitioner had $30,000 in renter's insurance in effect on May 15, 1990. He also admitted that he and his wife would have collected the insurance proceeds had the house burned down. Mr. Horning additionally testified that around the time of this incident, petitioner was competent enough to feed, dress and bathe herself. Around the time of the fire, petitioner also drove herself to appointments, received mail, was employed, watched television, and traveled, according to her husband. Petitioner even entertained, went to couples' clubs, did the shopping, knew right from wrong, and had an appreciation for law and order.

Dr. Dennis Savinsky was called by the defense to say petitioner did not know the wrongfulness of her act at the time the act was committed. On cross-examination, Dr. Savinsky admitted he rendered this conclusion without reviewing any witness statements, photographs, police reports, or even the petitioner's written narrative confession. Dr. Savinsky admitted his opinion was based primarily on discussions he had with petitioner and her behavior during those discussions. Dr. Savinsky also indicated that petitioner did several things before, during, and after the fire that would indicate she

knew the wrongfulness of her act. Dr. Savinsky characterized an insane person to be out of touch with reality, yet admitted that petitioner was not that sort of person.

Dr. Savinsky's testimony was rebutted by the testimony of Dr. Nancy Huntsman of the Court Psychiatric Clinic. Dr. Huntsman, licensed since 1977, had examined over 200 individuals in order to determine their competency to stand trial or their sanity at the time of a crime. Dr. Huntsman examined petitioner for both of these issues on August 20, 1990, in the Court Psychiatric Clinic. Prior to the examination, Dr. Huntsman reviewed a multitude of medical documents along with certain items in the prosecutor's file, which includes witness statements and police reports pertaining to petitioner. Based upon her investigation and examination, Dr. Huntsman testified that she believed petitioner was suffering from a mental illness at the time of the act, but that the mental disease did not impair petitioner's ability to know the wrongfulness of the act or her ability to refrain from acting. Petitioner's counsel during Dr. Huntsman's testimony even stipulated that petitioner was competent to stand trial.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

The petitioner has presented a total of two questions for review in her Petition for Writ of Certiorari.

In the first question for review, the petitioner alleges that she was mentally unsound at the time of the confession and was incapable of waiving her constitutional rights. The *sine qua non* of this argument is that constitutional error took place below. Not having demonstrated any error, however, one does not get to this issue. The petitioner does not challenge the standard's constitutionality, only the propriety of the application thereof by the trial and appellate court, hardly surprising as her conviction was affirmed.

In any event, assuming a federal question exists, a defendant is free to waive the rights referred to in the *Miranda* warnings "provided the waiver is made voluntarily, knowingly, and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The prosecution has the burden to prove that the confession was voluntary under the totality of the circumstances. *State v. Edwards*, 49 Ohio St. 2d 31 (1976). For a confession to be voluntary, it must be "*** the produce of free and rational choice." *United States v. Murphy*, 763 F.2d 202, 205 (6th Cir. 1985).

The factual inquiry as to voluntariness must necessarily focus on the conduct of the law enforcement officers and its effect on a reasonable person in the defendant's position. *See, Berkemer v. McCarty,* 468 U.S. 420, 82 L. Ed. 317, 336 and n.35 (1983).

In this case, petitioner submits evidence of her extensive psychiatric medical history. She also draws attention to the fact that her confession interview included denials and some delusional statements.

However, Lieutenant Gunsch testified that petitioner was coherent and did not exhibit unusual behavior before, during, or after the confession. The tape of the confession was played at the suppression hearing and at trial. The interview between Lieutenant Gunsch and petitioner was not hostile or coercive, and petitioner freely confessed to the crime. Certainly, petitioner would have a strong argument for involuntary confessions if it were true that Lieutenant Gunsch threatened or coerced her if she refused to answer his question. For example, in *Garrity v. New Jersey,* 385 U.S. 493, 494 (1967), police officers were told that they would be fired if they refused to cooperate in an investigation of departmental misconduct. The Supreme Court suppressed the officers' answers even though they failed to invoke the Fifth Amendment privilege. But unlike the defendants in *Garrity,* petitioner was never threatened if she refused to cooperate. She was never placed in a tiny room, administered truth serum or otherwise. In this case, the record makes it abundantly clear that, to the contrary, Lieutenant Gunsch went above and beyond the call of duty in determining whether petitioner's statements were "the product of free and rational choice." *Murphy, supra.* Twice, the petitioner acknowledged by signature that her statements were voluntary. Petitioner's written waivers of her rights were also admitted into evidence.

Petitioner wishes to equate mental illness to involuntary statements. However, although mental infirmity is surely relevant, the mere fact that petitioner claims to be mentally impaired does not prevent the obtaining of a valid confession if petitioner was not so influenced by mental illness at the time the confessions were made that she was able to knowingly, intelligently, and voluntarily waive her Fifth Amendment rights. *Blackburn v. Alabama*, 361 U.S. 199 (1960); *State v. Smith*, 61 Ohio St. 2d 284 (1991); *Johnson v. State*, 373 A.2d 300 (1977). As has been already discussed, there was nothing inherently coercive about the circumstances of petitioner's interview; and there is no support for her claim that her free will was overborne.

In summary, the State of Ohio submits the record demonstrates a thorough inquiry was conducted into the statements sought to be suppressed and the lower court's determination of its voluntariness should not be disturbed. Further, the petitioner's first assignment of error in support of her Petition for Writ of Certiorari raises no federal question. There is no special and important reason for granting the writ based on the argument of petitioner.

In her second argument, as in the first, the petitioner fails to present the court with a question of federal law. In summary, petitioner argues that she was prejudiced by the trial court's refusal to permit her attorney to question the State's psychiatric rebuttal witness about records of which the witness had no personal knowledge, nor had ever seen or heard.

Generally, "the trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate court] should be slow to interfere." *State v. Hymore*, 9 Ohio St. 2d 122, 128 (1967). Further, "[t]he term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Steiner v. Custer* (1940), 137 Ohio St. 448; *Conner v. Conner* (1959), 170 Ohio St. 85; *Chester Township v. Geauga Co. Budget Comm.* (1976), 48 Ohio St. 2d 372." *State v. Adams*, 62 Ohio St. 2d 151, 157-158 (1980).

Evid. R. 602 provides that witnesses may only testify as to matters of which they have personal knowledge. Thus, the lower court's decision is clearly in compliance with the Rules of Evidence and cannot be called unreasonable, arbitrary, or unconscionable. Since Dr. Huntsman had never reviewed, seen, or heard the records at issue, the court did not err in disallowing counsel's questions. Additionally, there is no showing that any of the proposed testimony, which was not properly proffered, would have affected the outcome of the trial. *United States v. Wright*, 625 F.2d 1017 (1980). Absent constitutional error and petitioner's failure to preserve this issue below, this argument must fail.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There has been no important question of federal law decided by the State appellate court and no important and special reason exists for the granting of a Writ of Certiorari.

Respectfully submitted,

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